No. 16,213

IN THE

United States Court of Appeals

For the Ninth Circuit

GUAM INVESTMENT COMPANY, INC., et al.,
Appellants,

vs.

CENTRAL BUILDING, INC., et al.,
Appellees.

On Appeal from the District Court of Guam for the Unincorporated Territory of Guam.

APPELLANTS' OPENING BRIEF.

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JURISDICTION.

This is an appeal from the Orders Dismissing Complaint entered by the District Court of Guam on the 10th day of June, 1958. Jurisdiction to hear this appeal is in this Court, pursuant to the provisions of Sections 1291, 1294, Title 28 U.S.C.A., as amended. This action arose under the statutes of the unincorporated territory of Guam, and is between citizens of that territory and one party is the citizen of the Territory of Hawaii.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

Guam Investment Company, Inc., is a corporation of the unincorporated territory of Guam. Kenneth Dang is a citizen and resident of the Territory of Hawaii. Defendants Central Building, Inc., Guam Savings and Loan Association, Inc., and Marianas Finance Company, Inc., are all corporations of the unincorporated territory of Guam. All individual defendants except Elizabeth S. Lujan are citizens of the United States of America and residents of Guam. Elizabeth S. Lujan is a resident of Guam and is on information and belief, a citizen of the Republic of the Philippines.

Defendant Central Building, Inc., was formed in the year 1953 and constructed on leased land a building known as the Central Building during that same year. During 1954 and 1955, various actions were commenced in the District Court of Guam against the defendant Central Building, Inc., including the case of Pan American World-Wide Airways sometime on or about the 19th day of September 1954.

Defendant Guam Savings and Loan Association purported to lend to Central Building, Inc., Fifty Thousand Dollars ($50,000.00) allegedly secured by mortgage, which mortgage though claimed filed on the 10th day of September 1954, was not recorded until the 5th day of June, 1955.

On the 22nd day of July, 1954, a Confession of Judgment was executed on behalf of defendant, Cen-

tral Building, Inc., in the action brought by Pan American World-Wide Airways, in which action, pursuant to a Judgment and Writ of Execution, a judicial sale was held, selling all the right, title and interest of Central Building, Inc., to the plaintiff, Kenneth Dang, and the Marshal's Certificate was filed in the District Court of Guam on the 15th day of August, 1955 and recorded on the following day in the Land Records of the Government of Guam. No redemption on this sale has ever been attempted. The sale was made pursuant to publication and was a public sale.

On the 19th day of March, 1955 a portion of the Central Building was leased to plaintiff, Guam Investment Company, Inc., for a period of five years with four successive options for the same period and said plaintiff paid in advance therefor the sum of Twenty-Five Thousand Dollars ($25,000.00), the said lease being recorded in Land Records of the Government of Guam on the 21st day of March, 1955.

At the same time of the execution of this lease, a Security Mortgage was executed to secure plaintiff Guam Investment Company's advance and was recorded on the same date as the mortgage given to plaintiff. On or about the 19th day of March, 1955 the purported mortgage to Guam Savings and Loan Association, Inc., allegedly being behind in payments, plaintiff Kenneth Dang, as president of plaintiff, Guam Investment Company, Inc., paid to defendant, Guam Savings and Loan Association, Inc., the sum necessary to bring the alleged payments up to date.

This payment was made upon advice of then counsel. Subsequent to that payment, Central Building, Inc., made no further payment.

On the 11th day of August, 1955 defendant Guam Savings and Loan, Inc., filed an action to foreclose the aforementioned mortgage and as a result of said action, a Decree of Foreclosure was entered and the said Central Building was sold by the Island Court of Guam to defendant Guam Savings and Loan, Inc.; in that foreclosure action an employee of defendant Guam Savings and Loan Association, Inc., was appointed receiver of the Central Building.

At the time of the sale to plaintiff Kenneth Dang of the interest of Central Building, Inc., a public sale after due notice, none of the defendants appeared, bid or took other steps to assert or protect their rights.

On the 26th day of July, 1956 defendant Guam Savings and Loan, Inc. executed its quit-claim deed to Marianas Finance Company, Inc., of its interest in Central Building. At the time of the foreclosure of the alleged mortgage by Guam Savings and Loan Association, Inc., on the property of the Central Building, Inc., agents of defendant Guam Savings and Loan Association, Inc. advised plaintiff Kenneth Dang to abstain from participating in such proceedings for the purpose of facilitating illegal foreclosure. Defendant Guam Savings and Loan Association, Inc., proceeded with the foreclosure and claimed to have secured a full and complete title to said property and that any rights of plaintiff had been severed by that action.

Accordingly, on the 28th day of March, 1958 the instant action was filed and service obtained upon the defendants. After various motions for an extension of time in which to answer or plead, simultaneous motions were filed on behalf of all defendants, that of Guam Savings and Loan Association, Inc. and Marianas Finance Company, Inc. being on the ground of Res Judicata, said motion being more in the nature of an answer, and on the part of the other defendants, a motion that the complaint failed to state a cause of action and upon Res Judicata.

After an oral argument, the District Court of Guam sustained these motions on the ground of Res Judicata.

We are faced with certain questions in this action as to whether or not in view of the complaint and the allegations therein contained, particularly the allegation of previous sale to plaintiff Kenneth Dang, knowledge of defendants alleged in the complaint of the payment by plaintiff Guam Investment Company, Inc. to defendant Guam Savings and Loan Association, Inc. on behalf of defendant Central Building, Inc., knowledge of the mortgage recorded on the 21st day of March, 1955 of the Central Building, Inc. to plaintiff Guam Investment Company, Inc., the allegation of the conversion of the chattels of Guam Investment Company, Inc., and the allegations of the conspiracy to assist foreclosure of the mortgage, as to whether or not the Execution of Sale to Kenneth Dang was not prior to the alleged mortgage to Guam Savings and Loan Association and whether or not

defendants are not charged with knowledge of said sale, as to whether or not the mortgage to plaintiff Guam Investment Company, Inc. was not a prior mortgage, and can a foreclosure action brought by defendant Guam Savings and Loan Association, Inc. preclude or affect prior rights and therefore, can such rights be litigated in a foreclosure action and such action be Res Judicata.

We are further faced with the question as to whether or not the failure to redeem from the sale of August 15, 1955, pursuant to Confession of Judgment filed on the 22nd day of July, 1955 does not cut off all subsequent rights of the parties. The further question is presented as to whether or not a valid claim for certain chattels and fixtures for plaintiffs was not asserted, which chattels and fixtures and personal property would not be determined in an action to foreclose a mortgage upon real estate. The collateral question, of course, arises and it would seem not to be barred for any estoppel as to whether or not, if not in fact, the sale to plaintiff Keneth Dang was superior and accounting should not have been ordered of the rents and profits.

Defendant Marianas Finance Company, Inc. as to Guam Savings and Loan Company, Inc. is a privity of this action, the property having been quit-claimed to said defendant. Plaintiffs seek judgment cancelling the marshal's deed of Central Building property to defendant Guam Savings and Loan, Inc., subsequently conveyed to Marianas Finance Company, Inc., and as shown here by an accounting of the rents, proceeds and for a judgment value for chattels converted and

that the plaintiff Kenneth Dang be declared the owner of the Central Building, Inc. pursuant to the original marshal's deed, or in the alternative, that the mortgage held by Guam Investment Company, Inc. be declared a prior lien on the Central Building.

Guam Savings and Loan Association, Inc. and Marianas Finance Company, Inc. set forth in their motion filed on the 13th day of May, 1958 that their foreclosure action was commenced on the 23rd day of January, 1956, in which they purported to name all parties claiming an interest in the assets of the Central Building and claimed that their foreclosure judgment is Res Judicata.

Paragraph 2 contained in Page 14 of the Transcript of Record clearly shows that this action, Civil Number 49-55, was a foreclosure action and also decided that all issues raised in the complaint had been decided in that foreclosure case. In the order entered on the same day with respect to the motion of Central Building, Inc., and its incorporators and stockholders that the complaint does not state a cause of action against said defendant, appellants believe the court was in error in its application of the rule of Res Judicata and that there was clearly an error in holding that all issues in the complaint had been previously litigated.

Appellants assert that the questions presented as to whether or not a superior title can be litigated in an action to foreclose a junior encumbrance and the further point to be determined is whether or not the court was in error in failing to take notice of the

executed sale held under its own order on the 22nd day of July, 1954 and confirmed by the court.

A further point to be determined is whether or not the court was not in error when it held a mortgage made subsequent to the execution sale of July 22, 1954 was superior to the title passed by such execution sale. The further question to be determined as to whether or not the court did not misconstrue the law on mortgages and whether or not it should not have directed an accounting of both the proceeds of the building and chattels of appellants. Appellants believe that it is a self-evident fact that foreclosure action can only determine certain issues and the allegations of the complaint in the instant action could not be all fully determined in such an action, that their rights and titles prior and superior to a mortgage cannot be litigated in an action to foreclose a junior encumbrance, and that the court should take judicial knowledge of its actions with respect to the same subject matter.

It is the view of the appellants that this controversy is as to the priority of rights of plaintiff Dang and plaintiff Guam Investment Company as to whether or not all issues have been previously litigated and substantially whether or not the issues in this matter should not be decided after the presentation of evidence and not upon a simple motion presumably under Rule 12 and the provisions of Rule 8 of the Rules of Civil Procedure.

STATUTES AND RULES INVOLVED.

Civil Code, Territory of Guam.

Section 2897. *Priority of liens.* Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia.

Code of Civil Procedure.

Section 674. *Judgment a lien upon recording of abstract.* An abstract of the judgment or decree of any court of record of Guam, or of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk of the court where such judgment or decree was rendered, may be filed with the Director of Land Management and from such filing the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, owned by him at the time, or which he may afterwards and before the lien expires, acquire. Such lien continues for five years from the date of the entry of the judgment or decree, unless the enforcement of the judgment or decree is stayed on appeal by the execution of a sufficient undertaking as provided in this code, or by statutes of the United States, in which case the lien of the judgment or decree, and any lien or liability now existing or hereafter created by virtue of an attachment that has been issued and levied in the action, unless otherwise by statutes of the United States provided, ceases, or upon an undertaking on release of attachment, or unless the judgment or decree previously satisfied, or the lien otherwise discharged. The abstract above mentioned shall contain the following: Title of

the court and cause and number of the action; date of entry of the judgment or decree; names of the judgment debtor and of the judgment creditor; amount of the judgment or decree, and where entered in judgment book.

Section 700. *Sale of real property, what purchaser acquires.* Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property; if the judgment is a lien upon the real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor on or at any time after the day such judgment became a lien on such property; and in case property, real or personal, has been attached in the action, the purchaser is substituted to and acquires time after the day the attachment was levied upon such property.

Section 701. *Real property so sold, by whom it may be redeemed.* Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

Section 702, as amended. *Redemption of Property, How and When.* The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within 12 months after the sale on paying the purchaser the amount of his purchase, with 1 per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase and interest on such amount. And if the purchaser be also a creditor, having a prior lien to that of the redemptioner other than the judgment under which said purchase was made, the amount of such lien with interest.

Section 726c. *Sale of the mortgaged property.* When the defendant, after being directed to do so, as provided in the last preceding section, fails to pay the principal, interest, and costs at the time directed in the order, the court shall order the property (or so much thereof as may be necessary) to be sold in the manner and under the regulations that govern sales of real estate under execution; but such sale shall not affect the rights of persons holding prior incumbrances upon the same estate or a part thereof. The sale, when confirmed by decree of the court, shall operate to divest the rights of all the parties to the action and to vest their rights in the purchaser. Should the court decline to confirm the sale, for good cause shown, and should set it aside, it shall order a resale in accordance with law.

F.R.C.P.

Rule 8(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and

award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Rule 12(b) *How presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief

can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

SUMMARY OF ARGUMENT.

Briefly, before considering the argument two key factors must be remembered. First, all cases in the District Court of Guam are handled in accordance with the federal rules of civil procedure and second, cases arising under the statutes of the territory of Guam are construed from a substantive law point of view in accordance with local rules of construction, thus it is as if we had a Federal District Court using its own procedures ruling on a local case arising under the statutes of a state.

Appellants claim that the District Court erred in applying the doctrine of res judicata in this case and that the file of this case discloses no basis for such application, as is shown by the numerous federal and California cases cited. Further, the files disclose that certain matters contained in the complaint could not have been determined in a foreclosure proceeding although the case upon which the District Court of Guam relied as res judicata was in fact a foreclosure proceeding.

Further, the files, and there is nothing else in this case except pleadings, clearly disclose that all issues

could not have been determined by a previous case and could not have been determined between the parties since they could not have been determined in any previous case, particularly the one relied upon.

Appellants also contend that the District Court of Guam was gravely in error by holding, contrary to the statutes, that a claim of superior right could be litigated in a foreclosure action when a junior encumbrance is sought to be foreclosed. The California cases in particular clearly make such plain. Appellants also contend that the District Court of Guam was in error in its application of judicial knowledge in the light of the cited cases, particularly in the case cited in a similar instance and decided by the Court of Appeals of this circuit. Even in res judicata there must be sufficient in the record upon which to sustain such a holding when the basis for such a ruling is not apparent upon the face of the pleadings. Otherwise, a holding unsupported by any factual demonstration will forever preclude a litigant whenever a court made a finding of res judicata without anything to support such a finding other than the opinion of the court. Appellants contend that the error is obvious. The District Court ignored the principles of priority of liens and ignored its own act in approving a sale prior to the effective date of the mortgage of the appellees. Such a fundamental error should not pass unnoticed.

The District Court was also in error in not directing an accounting of both the Central Building and of the chattels since such an accounting would have furnished sufficient basis upon which to rest its hold-

ing. The District Court gravely erred in that the statutes clearly prescribe the priority of liens and the steps to be taken in enforcing such. They clearly delineate the rights of all parties. These questions are matters of fact to be proven by evidence. Further, the fact of the judgment sale was totally disregarded despite the provisions of the statutes. In the argument this is set forth at length.

As a conclusion, appellants contend that the District Court was in error and that this entire matter should be remanded to the District Court for such further proceedings as may be appropriate and that appellees should be required to answer or move to the complaint.

ARGUMENT.

Before commencing the argument in this case, two facts on which the entire stand of appellants is premised must be set forth. First, all proceedings in the District Court of Guam, except so much as they may be affected by the unrepealed provisions of the Conformity Act, must under previous decisions of this court, be conducted in conformity with federal rules of civil procedure and in effect, handled as arising under federal jurisdiction. Second, that in applying substantive law arising under and cases hinging thereon, the statutes of the unincorporated territory of Guam, the District Court of Guam though sitting as a legislative court of dual jurisdiction and though acting under the provisions of the federal rules of civil pro-

cedure, must determine those facts and apply that law as if it were a Supreme Court of the territory.

Appellants believe that in the absence of reported decisions of the District Court of Guam construing territorial statutes, the best guide is the decisions of the courts of record of the State of California insofar as certain statutory provisions were copied from the codes of the State of California. Since basically the original code of Guam, a fact of which this court may take notice, was enacted in the years 1932 to 1933, based upon an adoption of certain, though not all of the codes of the State of California, it is believed that a fair and reasonable assumption is that insofar as justice or law will permit, any sections of the codes of the unincorporated territory of Guam not adopted verbatim from those of the State of California should be construed wherever possible in consonance with the judicial concepts of that state. This appellants believe to be a rule of substantive justice in view of the fact that essentially the basic principles of the laws and statutes of the unincorporated territory of Guam are those of the State of California.

In the interests of having a unified system of laws, it is believed that this is the logical approach to an analysis of the codes of Guam. Appellants believe that in such instances as a statute has been adopted from another jurisdiction without any change other than names, dates or places, in the absence of local instruction to the contrary, the best, if not the ruling, guide is the interpretation placed upon such statutory provisions by the highest court of the jurisdiction

from which adopted and further that in accordance with simple reason and logic, such statutory provisions, whether or not copied in toto or whether of local draftsmanship should be interpreted in the light of the basic principles of the jurisdiction from which the foundations of the local code were adopted. Therefore, it is believed that no authorities are necessary to cite to support the position in the absence of any local constructions.

The constructions placed on a statutory provision copied verbatim from the codes of the State of California should be as a rule of law constructed as construed by the Supreme Court of California and that other sections not so copied should be constructed with the highest respect paid to the decisions of the codes of the State of California. It is in the light of these basic principles both, appellants believe, of law and fundamental logic that the argument has been evolved.

I.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN HOLDING THAT THE DOCTRINE OF RES JUDICATA APPLIED IN THIS CASE.

Appellants believe that the principles of res judicata require no statement of authorities since they are fundamental and known to all, and believe that they are fundamentally that litigation shall determine with respect to the same litigants or their privities, the same subject matter, the same claims and the same

facts of evidence as are thereafter to be held res judicata as to all the parties. However, appellants believe that it is the application of these basic principles wherein the errors arise.

In the instant case a complaint was filed which alleged various facts, including the claim of a superior and prior right and title to the subject matter of this action and made further allegations including the conversion of chattels, fraud and sought relief in accordance with the theory of the complaint. No evidence was taken at the hearing on the motion. The motion of all defendants was based on res judicata and that of part of the defendants was based upon the failure to state a claim. The doctrine of res judicata was applied with respect to a previous action in which defendants Guam Savings and Loan Association, Inc. had filed suit against defendants Central Building, Inc. upon a mortgage seeking its foreclosure and had named numerous defendants including the present plaintiff Kenneth Dang as parties to the action. The District Court of Guam accordingly took judicial notice of this foreclosure action, and in the light of that judicial notice held that all issues between all parties had been previously determined. It is obvious, as will be shown later, that certain issues raised by the complaint were not and could not have been litigated in a foreclosure action.

First, in a foreclosure action, which is the statutory enforcement of a lien, only certain matters can be properly tried, and second, certain of these issues are subsequent to the action for foreclosure and therefore

by no system of logic could be presumed to have been litigated. Res judicata, in certain cases where the facts or evidence shown in the complaint and the other pleadings on matters in evidence before the court, may be decided with nothing further in the light of certain decisions though contrary to the plain meaning of the rule permitted to be raised on motions. However, in the majority of cases it would appear that the rule must prevail.

Rule 8(c) is quite explicit with respect to this. In the absence, from the record of this case, of sufficient evidence including testimony, affidavits, exhibits or certified records, can it be held that this action is a proper one in which to apply res judicata? Appellant contends otherwise, and believes that the general rules cover this case and there was error in attempting to apply the doctrine of res judicata. Support is found in the following cases.

> ". . . We take judicial notice of proceedings in our own court, and are mindful of the fact that appellant prosecuted an appeal from an adverse judgment in a former action by him and that the former action was founded upon a written contract. Zeligson v. Hartman-Blair, Inc., 10 Cir., 126 F.2d 595. No doubt that judgment will present itself as a barrier at some stage of this case, but whether plaintiff can hurdle it cannot be determined on a motion directed to the sufficiency of the complaint. Res Judicata, estoppel, or any other matter constituting an avoidance or affirmative defense must be affirmatively pleaded. Rule 8(c), Rules of Civil Procedure, 28 U.S.C.A. following section 723c. Such defenses may not be

raised by a motion addressed to the sufficiency of the complaint. . . ."

Zeligson v. Hartman-Blair, 135 F.2d 874.

". . . With respect to a specific affirmative defense such as res judicata, the rule seems to be that if the facts are admitted or are not controverted or are conclusively established so that nothing further can be developed by a trial of the issue, the matter may be disposed of upon a motion to dismiss whether the decision of the District Court be considered as having been arrived at under the provisions of Rule 12(b) (6) or Rule 56(c), F.R.C.P., 28 U.S.C.A.2 Moore's Federal Practice (2nd Ed.) 1698, 2256, 2257; Chappell v. Goltsman, 5 Cir., 186 F.2d 215, 218. . . ."

Larter & Sons v. Dinkler Hotels Co., 199 F.2d 855.

". . . At the oral argument, defendants' attorney argued two reasons in support of the motion, the principal reason being res judicata. Under Rule 8(c) res judicata is deemed an affirmative defense. The complaint in this action avers facts meagerly which defendants rely upon as res judicata, but these facts are not sufficiently averred so that the Court can determine whether the same constitutes res judicata or not. I am of the opinion that the facts in this case should be more fully developed before the questions involved are passed upon by this Court; and for the reason that the Court cannot say under Rule 12(b) that the complaint fails to state a claim upon which relief can be granted, the motion to dismiss should be refused. . . ."

McRanie v. Palmer, 2 F.R.D. 479.

". . . Ordinarily, the defense of res judicata cannot be considered except when pleaded as defensive matter. But on a suit to set aside a judgment, which judgment of course must be alleged in the complaint, the effect of that judgment must be considered when determining whether or not the complaint states a cause of action on a demurrer or a motion to dismiss.

"That does not preclude a defendant, however, from asserting res judicata as a special defense or claiming that other facts or issues were adjudicated which do not appear on the face of the complaint.

"The doctrine of res judicata has been variously stated. Without repeating all the definitions and the varying shades of thought, let it suffice to quote from 34 Corpus Juris page 743, Paragraph 1154, *'Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in,* the determination of an action before a competent court, in which a judgment or decree is rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.' . . ."

United States v. Kusche, 56 F. Supp. 201.

The California Courts in discussing the question of res judicata in similar types of cases involving foreclosures and mortgages have followed the same basic principles based upon their interpretation of the rights derived from substantive law and the following cases from the Supreme Court of California support the position of appellants.

". . . Where, the plaintiffs in the action to quiet title, having a title prior, adverse, and paramount to that of the mortgage, were made parties defendant to the foreclosure thereof, under the usual allegations in the complaint that the defendants other than the mortgagor claim some interest in the premises, and that such interest is subsequent and subordinate to that created by the mortgage, without setting forth the particulars of the defendant's claim, or showing that it was prior in time to the mortgage, the judgment of foreclosure does not become res judicata as to the prior adverse title of the plaintiffs. . . ."

Beronio v. Ventura Lbr. Co., 129 C. 232, 79 Am. St. Rep. 118, 61 P. 958.

". . . The principle that adverse titles cannot be litigated in a foreclosure suit, and are not affected by the decrees of foreclosure, applies as well to adverse equitable estates as to legal estates. . . ."

Murray v. Etchepare, 129 C. 318, 61 P. 930.

". . . The paramount title of the purchaser at sheriff's sale is not a proper subject of litigation in a subsequent action to foreclose the mortgage, and if not expressly adjudicated in such action cannot be affected by the decrees of foreclosure, nor by the sheriff's sale under the decree. . . .

". . . Where the purchaser at the sheriff's sale was made a party defendant to the foreclosure suit, under an averment that his interest was subject and subordinate to that of the mortgagee, and he took issue upon that averment, and pleaded his title as paramount thereto, and all paramount rights of defendants, excepting the defendant mortgagor, were reserved in the decree, such pur-

chaser is not estopped by the decree from asserting his paramount right in an action by him to quiet his title against the purchaser under the decree of foreclosure. . . ."

Cady v. Purser, 131 C. 552, 82 Am. St. Rep. 391, 63 P. 844.

Therefore, appellants believe that the application of the doctrine of res judicata in the instant case was error.

II.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN HOLDING THAT ALL ISSUES OF PARTIES HAD BEEN PREVIOUSLY LITIGATED.

It is clear from the orders of the District Court of Guam dismissing the complaint in the instant case that the case upon which the court relied for the application of res judicata and its finding that all issues and matters between all parties had previously been determined is in error and furthermore that in the absence from the records of Civil Case #49-55 in the District Court of Guam, upon which record the court rested its decision, it is impossible for this court or any other court to determine whether or not all or any issues had been so determined or resolved. The records and files of that case were never introduced in evidence. Furthermore, this court may, appellants believe, take cognizance of the fact that in a foreclosure action there are only certain matters that may be litigated and that certain matters, if brought, being

extraneous to the purpose of the case, are of no effect, being in essence, surplusage.

Since the complaint alleged a fraud and a conspiracy and sought relief for the conversion of chattels, sought to set aside a judicial sale, sought accounting for the value of chattels and for income of properties claimed to belong to plaintiffs, it is quite obvious that all matters in controversy between the parties could not have previously been determined in a foreclosure action.

Therefore, appellants contend that it must be held that all matters could not have been and were not determined in the former action and furthermore that if certain of these matters, including a superior title and a prior lien, had been purported to be so determined, such would have been null and void. Therefore, appellants contend the District Court of Guam was in error in holding that all issues between the parties had been previously litigated.

III.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN HOLDING THAT A CLAIM OF SUPERIOR RIGHT COULD BE LITIGATED IN A FORECLOSURE ACTION SEEKING THE FORECLOSURE OF A JUNIOR OR INFERIOR RIGHT.

The matter of precedence of liens and title is a matter of substantive law and therefore, the statutes of the unincorporated territory of Guam as interpreted by the Supreme Court of California in such cases as the statute was adopted verbatim is, we believe, the

law which must be applied and as to other statutes, the best guide available. Whether or not a lien is prior is, appellants contend, a matter of evidence, not inference, and cannot be determined either upon reading of the complaint in the absence of factual statements, by a motion to dismiss raising a conclusion of law, or by judicial knowledge derived from a related case.

Section 2897 of the Civil Code of Guam specifically states that liens take priority in accordance with the time of their creation. The basis of the title of plaintiff Kenneth Dang is upon a judgment sale by order of the District Court of Guam, Civil Case #46-54. The certificate of sale executed by the Marshal was dated the 15th day of August, 1955.

Section 674 of the Code of Civil Procedure of Guam specifically states that the filing of an abstract of judgment of a court of record becomes a lien as of the date of filing.

Section 700 of the Code of Civil Procedure specifically provides that upon the sale of real property, the purchaser acquires all the right, title and interest of the judgment debtor thereto on the date of the levy of execution thereon and if the judgment is a lien upon real property the purchaser acquires all those rights of the judgment as of the day such judgment became a lien on the property. Under the complaint, appellants allege that the claim to title of plaintiff Kenneth Dang is based upon such a sale, said sale being prior in time to any rights of defendant Guam Savings and Loan Association, Inc., or its assignees.

In determining similar cases as to the priority of rights, the Supreme Court of California has had occasion to pass upon similar questions in numerous cases, and has also held that a junior claimant cannot litigate or force the litigation by a superior title of its rights in a foreclosure action. Since the complaint is in essence based upon a claim of superior title, that is a fact which must be determined, appellants contend, after a hearing on evidence and not upon a motion or judicial knowledge. The following cases support these contentions.

> ". . . Adverse titles to the premises held by parties claiming by conveyance from the mortgagor prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination in the suit. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance. . . ."
>
> *City and County of San Francisco v. Lawton,* 18 C. 465, 79 Am. Dec. 187.

> ". . . Where an adverse title to the mortgaged premises held by parties claiming by conveyance prior to the mortgage, or by title paramount to the title of the mortgagor, is not the proper subject for determination in a suit for foreclosure, the court may refuse to pass upon such title, and the proper course would be to dismiss the action as to the adverse claimant, or to specify in the decree that it is made without prejudice to his adverse rights. . . ."
>
> *Ord v. Bartlett,* 83 C. 428, 23 P. 705.

". . . A decree of foreclosure is in better form when it expressly saves all paramount and hostile rights asserted by a defendant; but the absence of such form is not material, as the decree, no matter what its terms may be, has no effect whatever upon a paramount and adverse title or estate. . . ."

Murray v. Etchepare, 129 C. 318, 61 P. 930.

". . . A decree of foreclosure will not affect the rights of priority of one claiming a title to the land and paramount to that of the mortgagor. . . ."

McComb v. Spangler, 71 C. 418, 12 P. 347.

". . . Where prior encumbrances are made parties, it is only for the purpose of liquidating the amount of their demands, and paying them out of the proceeds of the sale. . . ."

San Francisco v. Lawton, 18 C. 465, 79 Am. Dec. 187.

". . . Persons claiming title adversely to the mortgagor are not proper parties to a foreclosure suit, as they have no interest in the subject matter of the action. . . ."

Croghan v. Minor, 53 C. 15.

". . . In an action to foreclose a mortgage, a person who sets up a claim to the land adverse and paramount to that of the mortgagor and who therefore denies the efficacy of the mortgage as a lien on his own title, cannot properly be joined as a defendant. . . ."

McComb v. Spangler, 71 C. 418, 12 P. 347.

". . . In an action to foreclose a mortgage, a title claimed adversely to the mortgagor cannot be litigated. . . ."

Marlow v. Barlew, 53 C. 456.

". . . A claim adverse and paramount to that of the mortgagor cannot be tried in an action to foreclose a mortgage. . . ."

McComb v. Spangler, 71 C. 418, 12 P. 347.

". . . An adverse title to the mortgaged premises held by parties claiming by conveyance prior to the mortgage or by title paramount to the title of the mortgagor, is not the proper subject of determination in a suit for foreclosure. . . ."

Ord v. Bartlett, 83 C. 428, 23 P. 705.

". . . A title paramount and hostile to the title of the mortgagor and mortgagee cannot be litigated in an action to foreclose the mortgage. . . ."

Cody v. Bean, 93 C. 578, 29 P. 223;

Murray v. Etchepare, 129 C. 318, 61 P. 930;

Cady v. Purser, 131 C. 552, 559, 82 Am.St.Rep. 391, 63 P. 844.

Therefore, appellant contends that the District Court of Guam was in error.

IV.

THE DISTRICT COURT OF GUAM ERRED IN ITS APPLICATION OF THE PRINCIPLES OF JUDICIAL KNOWLEDGE TO THIS CASE AND FURTHER ERRED IF IT WERE TO TAKE SUCH KNOWLEDGE IN FAILING AND REFUSING TO TAKE KNOWLEDGE OF ITS OWN DECISION IN CIVIL CASE NO. 46-54, IN WHICH CASE THE SALE OF THE CENTRAL BUILDING, INC. WAS INVOLVED AND THE SALE WAS CONFIRMED BY ORDER OF THE DISTRICT COURT OF GUAM.

Judicial knowledge has been used in many cases to obviate the necessity of proof. It is not a substitute for contested evidence. Appellant reasons that its application must be in conformity with certain practical rules. One of the common items of judicial knowledge is the capitals of states, the boundaries of counties, national treaties, etc. Those facts are readily available to everyone from standard books of reference; therefore, when a court takes knowledge of such a fact as that Hartford is the capital of the State of Connecticut, the truth of that is readily ascertainable anywhere and thus much needless expense and time of proof are obviated.

However, when a court takes judicial knowledge of such a matter as a case previously tried by said court, that in truth is a matter within the knowledge of said court, but in actual fact, it is also a matter contained within the files of such court and the files of counsel in said case, and checking the accuracy of the court's knowledge is beyond the powers of anyone outside that court. It is this principle of the application of judicial knowledge wherein the District Court of Guam failed. Courts being human can misinterpret or misread even their own notes.

Appellant contends that the District Court of Guam if relying on its knowledge of its own cases, should have taken knowledge of all cases involving any of these parties in which the subject of this action, Central Building, was involved and, secondly, that it was a fundamental error in not making the files of such cases a part of this file.

Appellants believe that this error is apparent and that a similar misapplication of this rule was considered by this court in the following case.

> ". . . As a general rule, a court in one case will not take judicial notice of its own records in another and distinct case even between the same parties, unless the prior proceedings are introduced into evidence. National Surety Co. v. United States, 9 Cir., 29 F.2d 92, 97; Paridy v. Caterpillar Tractor Co., 7 Cir., 48 F.2d 166, 168; Divide Creek Irr. Dist. v. Hollingsworth, 10 Cir., 72 F.2d 859, 862, 863, 96 A.L.R. 937; Funk v. Commissioner of Internal Revenue, 3 Cir., 163 F.2d 796, 800-801; 20 Am. Jr. 105, Evidence, Sect. 87. The rule is not, however, a hard and fast one. The extent to which it will be applied depends in large measure upon considerations of expediency and justice in the circumstances of the particular case. Morse v. Lewis, 4 Cir., 54 F.2d 1027, 1029; Ellis v. Cates, 4 Cir., 178 F.2d 791, 793; 31 C.J.S. Evidence, Sect. 50, pages 623, 624; IX Wigmore on Evidence (3rd Ed.), 570.
>
> "Among the recognized exceptions are instances in which the prior case is brought into the pleadings in the case on trial, Suren v.

Oceanic S.S. Co., 9 Cir., 85 F.2d 324, 325, or where the two cases represent related litigation, Freshmen v. Atkins, 269 U.S. 121, 124, 46 S.Ct. 41, 70 L.Ed. 193; Kitheart v. Metropolitan Life Ins. Co., 8 Cir., 88 F.2d 407, 411; Fletcher v. Vryan, 4 Cir., 175 F.2d 716, 717.

"In the instant case appellant mentioned the prior case in her complaint. In the third cause of action she alleged that 'by virtue of a judgment entered in cause No. 6714, Fairbanks, Alaska, on or about the first day of April, 1952, the Plaintiff, Grace Lowe, individually was awarded a one-half interest in said equipment.' (The Fairbanks drill in controversy.) The allegation was admitted in the answer. During the trial appellant many times discussed case No. 6714, and at one point in addressing the court, referred to the 'transcript' in that action in such a manner as to indicate that she then had the transcript before her. She produced an exhibit in No. 6714, a copy of the Mahan-McDonald mining lease, offered it in evidence in the case on trial, and tried to persuade opposing counsel to renew a stipulation which he had made concerning the exhibit in the former trial. When the court sustained objections to her proffered evidence in support of causes of action three and four on the ground that the issues had been adjudicated in the prior case, she did not question or dispute the court's assumptions or statements as to the nature or effect of the prior proceedings. On the contrary, she moved the court 'to reform that adjudication on the grounds of newly found evidence of title.' The court responded, 'It is too late to do that.' After judgment for defendants had been entered in the

present case, plaintiff, on November 9, 1953, moved in case No. 6714 for modification of the judgment entered therein on April 1, 1952. The court denied the motion on November 19, 1953.

"We think that the present case comes within the exceptions to the general rule, and that, in the circumstances just related, the trial court properly took judicial notice that the rights of the parties in the Fairbanks drill had been fully adjudicated in the prior action."

Lowe v. McDonald, 221 F.2d 228.

Our position is further supported by the holdings of the United States Court of Appeals for the Seventh Circuit.

". . . It is true that a court will take notice of its own records, but it cannot travel for this purpose out of the record relating to the particular case; it cannot take notice of the proceedings in another case, even between the same parties and in the same court, unless such proceedings are put in evidence.

". . . If the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case in hand, conclusive against the opposing party; while if they had been properly introduced they might have been met and overcome by him. So, on a plea of res judicata, a court cannot judicially notice that the matters in issue are the same as those in a former suit. Such matters must be pleaded and proved. 15 R.C.L. p. 1111, Sect. 42.

". . . The rule provides a most expeditious way of disposing of this issue, i.e., by answer; but

> appellee chose rather to present it by motion to dismiss and relied upon the court's judicial knowledge in lieu of evidence, and we think this cannot be done under the facts of this case, for the instant and prior cases cannot be considered the same even though one issue is present in both."
>
> *Parkersburg Iron & Steel Co. v. Burnet,* 48 F.2d 163.

Therefore, appellants contend that the District Court of Guam erred in its application of the doctrine of judicial knowledge.

V.

DISTRICT COURT OF GUAM WAS IN ERROR IN HOLDING THAT A MORTGAGE MADE SUBSEQUENT TO THE EXECUTION SALE BY ITS OWN ORDER OF THE CENTRAL BUILDING ON THE 22ND DAY OF JULY, 1954 COULD BE SUPERIOR TO TITLE PASSED BY SUCH EXECUTION SALE.

As was shown previously, liens take priority by statute in the order in which they arise. A judgment lien when reduced to sale is but the enforcement of such a lien. The rights arising under a judgment sale relate back as shown previously, to the date of execution. The District Court of Guam disregarded this simple principle of the law of real estate and mortgages and by inference held that by merely naming a superior titleholder as a party defendant that such rights could be forever cut off.

The Supreme Court of the United States as long ago as 1879 clarified this basic principle of law.

". . . Priority of lien certainly gave priority of legal right, just as in the case of a first and second mortgage. Either may proceed in the case of mortgage, where the condition is broken, to foreclose; but if the second mortgagee proceeds first, his decree of foreclosure does not supersede or impair the rights of the first mortgage, nor did the proceedings of the plaintiff to enforce the lien of his judgment have any effect whatever to supersede or displace the prior lien under which the defendants claim."

Howard v. Milwaukee and St. Paul R. Co., 101 U.S. 837.

Again in 1926 in the case of *Portneuf Marsh Valley Canal Company v. Brown,* the Supreme Court stated, "Usually liens which are prior in time are prior in equity." 274 U.S. 630.

The Court of Appeals for the Tenth Circuit held in the case of *Whiteside v. Rocky Mountain Fuel Company,* 101 F.2d 765,

"No one except for a valuable consideration and without notice can acquire an interest in property as against valid prior liens."

The Supreme Court of California has had occasion to discuss similar instances as the following cases show.

". . . When there are no judgment or attachment liens, the levy of an execution upon real property operates as it does upon personal property; that is, the execution first levied has a priority of lien as between different executions."

Bagley v. Ward, 37 C. 121, 99 Am. Dec. 256.

". . . The sheriff's deed, when executed, takes effect from the time the lien of the judgment attached. . . ."

McMillan v. Richards, 9 C. 365, 70 Am. Dec. 655.

". . . The general rule touching liens is that preference goes with priority. . . ."

Mortgage Securities Co. v. Pfaffmann, 177 C. 109, L.R.A. 1918D, 118, 169 P. 1033.

Thus appellants contend that the results arrived at by the District Court of Guam were error and that in the absence of evidence such a holding could not and cannot be sustained. The court, one believes, is bound by the ancient principle that all allegations of a complaint on a motion to dismiss must be answered as if established for the purpose of the motion.

Now, therefore, can the court have arrived at any such finding? Surely a motion to dismiss unsupported by anything will not sustain such a holding. Therefore, appellants contend that the District Court of Guam was in error.

VI.

THE DISTRICT COURT OF GUAM ERRED IN NOT DIRECTING AN ACCOUNTING OF THE CENTRAL BUILDING.

Appellant contends that the District Court of Guam should have directed an accounting for two reasons. First, that by an accounting the court might have been advised as to the true state of matters in the Central

Building and might have secured information as to the priority of liens and secondly, based upon the principles that the allegations of a complaint must be accepted for the purposes of the action until overcome by the preponderance of evidence that the court should have acted upon such principle and ordered accounting.

VII.

THE DISTRICT COURT OF GUAM ERRED IN NOT DIRECTING AN ACCOUNTING OF THE CHATTELS OF APPELLANTS CONVERTED BY APPELLEES.

This error can be set forth briefly—If the chattels belonged to any of the defendants, appellants would have no claim to them. If they belonged to appellants or either of them, they could not have been the subject of the previous foreclosure action by the Guam Savings and Loan Association, Inc., and Central Building, Inc. Judicial knowledge as to their ownership could not have been taken by the court based upon that case and an accounting would have shown that fact.

VIII.

THE DISTRICT COURT OF GUAM WAS IN ERROR AS TO THE LAWS OF MORTGAGES AND MISAPPLIED THE PERTINENT STATUTES.

As set forth previously, Section 2897 of the Civil Code of Guam clearly specified the priority of liens. Sections 674, 700, 701, 702 and 726(c) of the Code of Civil Procedure of Guam specify the effect of a judgment, the time at which a judgment lien takes effect,

the procedure for redemption, by whom redemption may be made, and also clearly sets forth the effect of failure to redeem. It may be said in passing that the District Court of Guam also misconstrued the provisions of Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure. Basically under the statutes of Guam, a lien holder is first come, first served. Therefore, in effect, if the lien either by the mortgage to Guam Investment Company, Inc. or the lien on the judgment in the Pan American action referred to were prior in time to that of the mortgage held by Guam Savings and Loan Association, Inc., under the statutes, such liens take priority.

If at the time of the making of the mortgage by Guam Savings and Loan Association, Inc. it had or should have had, and in contemplation of law, would be charged with having knowledge express or implied of these liens or rights, they would take priority. These liens or rights, as has been shown previously and set forth in the complaint, cannot be determined by reference to the files of Civil Case #49-55 and would have to be established by evidence. In the instant case, no testimony was taken, no affidavits were filed, no evidence was introduced. The file consists merely of the complaint, the motions to dismiss and the ruling on the motions. The following cases from both federal courts and the Supreme Court of California support this position.

> ". . . The complaint should not be dismissed on motion unless, upon any theory, it appears to a certainty that the plaintiffs would be entitled to

no relief under any state of facts that could be proved in support of his claim. Des Isles v. Evans, 5 Cir., 200 F.2d 614, 615, 616, and authorities there collected."

Lewis v. Brautigam, 227 F.2d 124.

". . . On a motion to dismiss, the averments of the complaint together with all reasonable inferences therefrom must be accepted as true; and all legitimate intendments of the pleader in narrating alleged facts must be resolved in favor of the pleading attacked. . . ."

Pheiffer v. Pennsylvania R. Co., 186 F.2d 558.

". . . The docketing of a judgment imparts constructive notice of the lien of the judgment on the real estate of the judgment debtor to strangers to the judgment. . . ."

Page v. Rogers, 31 C. 293.

". . . In this state a judgment, when docketed, is by statute made a specific lien on all the lands of the judgment debtor, before as well as after levy. . . ."

Hibernia Sav. & Loan Soc. v. London & Lancashire Fire Ins. Co., 138 C. 257, 71 P. 334.

". . . A judgment lien is not a transfer or conveyance of real property, nor does it create a specific lien on the real estate of the judgment debtor; but it is merely a general lien, and is subject to all prior liens, legal or equitable. It merely confers the right to levy thereon to the exclusion of other adverse interests arising subsequently to the judgment. . . ."

Huff v. Sweetser, 8 C.A. 689, 97 P. 705.

". . . Docketing a judgment consists of an entry in the docket in the clerk's office of a brief abstract of the judgment. . . ."

Eby v. Foster, 61 C. 282.

". . . If a person is about to make a loan and take a mortgage upon land as security, and employs an agent, an attorney, to make the negotiation, a declaration made by a tenant in possession of the land to the agent that another person owns an interest in the land, is sufficient to put the mortgage on inquiry, and if due diligence is not exercised in making such inquiry, the mortgage, even if the paper title appears to be in the mortgagor, is subject to the rights of such other person in the land. . . ."

Bauer v. Pierson, 46 C. 293.

". . . One who takes a mortgage upon land, in the sole and exclusive possession of another, can disprove notice of that other's claim only by showing that he made every proper inquiry in respect to the rights of the possessor, and failed to obtain information; but to have such an effect, it must appear that the possession is open and notorious. . . ."

Hellman v. Levy, 55 C. 117.

A further point to be considered is the failure of the court to give consideration to the fundamental principles that a complaint will not be dismissed on motion unless the plaintiff under no condition will be entitled to any relief. Therefore, appellants contend that the District Court of Guam erred in its application and interpretation of law, both of mortgages and judicial

sales in the unincorporated territory of Guam, and should be reversed.

CONCLUSION.

Appellants contend that the District Court of Guam misapplied the statutes and rules, that it erred in holding that the doctrine of res judicata applied in the instant case as disclosed by the files of this case, that the court was in error in holding that all issues between the parties had been previously concluded, that the court failed to appreciate that a claim on superior title could not be litigated in a foreclosure action, that the court was in error in applying the principle of judicial knowledge, and that a mortgage subsequent to an execution sale could be superior to that sale. Therefore, appellants believe that the District Court of Guam should be reversed and the case remanded to the District Court for further proceedings.

Dated, Agana, unincorporated territory of Guam,
10 February, 1959.

Respectfully submitted,

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